

**Board of Alien Labor Certification Appeals
United States Department of Labor
Washington, D.C.**

DATE: August 24, 1998
CASE NO: 97-INA-170

In the Matter of:

BACK-O-BEYOND
Employer

On Behalf of:

CALLANTA GULLA
Alien

Appearance: Albert D. Garganigo, Esq.
New York, NY
For the Employer and Alien

Before: Holmes, Jarvis, and Vittone
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. §1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by §212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney

General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the Appeal File,¹ and any written argument of the parties.

Statement of the Case

On March 24, 1995, Back-O-Beyond ("employer") filed an application for labor certification to enable Callanta Gulla ("alien") to fill the position of Live-in Cook at a weekly wage of \$400 (AF 11). The job requirement for the position is two years of experience in the job offered, and the job duties are described as follows:

Plan menu, cook and serve meals, fancy dishes and pastries, in private guest house.
Prepare foods for special diets. Clean kitchen and cooking utensils.

On April 25, 1996, the CO issued a Notice of Findings proposing to deny the labor certification. The CO determined that the employer failed to establish that the position is full-time employment under §656.3. The CO therefore requested the employer to submit detailed evidence which clearly establishes that the position constitutes permanent, full-time employment. Noting that the employer operates a conference complex and company retreat, the CO questioned whether a full-time employee was needed at all times during the year. The CO therefore instructed the employer to: (1) identify all guests over the last two years, (2) address whether the worker would be required to perform duties other than those relating to cooking, and (3) describe the kitchen and dining facilities. The CO also challenged the employer's compliance with §656.21(b)(6) which requires the employer to demonstrate that it rejected U.S. workers for lawful, job-related reasons. The CO pointed out that this provision applies not only to formal rejections, but also to actions taken by the employer which effectively discourage applicants. The CO specifically objected to the rejection of Applicants Noor Hossain, Dorothy Stokes, and Mikhail Fedotov (AF 77).

In rebuttal, dated May 23, 1996, the employer argued that the guest complex is occupied on a year-round basis and thus requires a permanent, full-time staff (AF 169). The employer explained that the conference center consists of conference rooms, three guest houses, a golf course, and tennis courts. It also indicated that the complex employs 14 full-time workers year-round and hires an additional 45 employees for the summer months. The three guesthouses accommodate up to 41 guests, and each guest house is staffed with a Cook who prepares breakfast, lunch, and dinner seven days a weeks according to guest requests. The employer

¹ All further references to documents contained in the Appeal File will be noted as "AF."

argued that the only duties performed by the Cook are those normally required for the performance of the job as defined by the DOT. As to the CO's request that it identify all of the guests over the last two years, the employer argued that it is not a hotel and thus does not possess specific registration information from the last two years. The employer also argued that the names of guests are privileged information as the guest list includes not only the company's executives and managers, but also many private and public figures. Regarding recruitment efforts, the employer argued that it lawfully rejected the three applicants that were referred by the state employment agency. The employer pointed out that even though none of the three had household cook experience on their resumes, it contacted them by mail to arrange for interviews. The one applicant who responded, Mr. Noor Hossain, was interviewed and rejected because he possessed only fast food restaurant experience and could not perform many of the duties associated with the position. The employer further pointed out that Mr. Hossain could not provide evidence indicating any experience as a Household Cook.

The CO issued the Final Determination on June 6, 1996 denying the labor certification. The CO acknowledged that the employer rebutted the findings relating to two of the three applicants, but continued to dispute the rejection of Applicant Noor Hossain. The CO also found the employer's evidence relating to full-time employment unconvincing and stated that it was evident the guest houses were running at far less than full capacity, both in frequency of use and residency occupancy.

On September 9, 1996, the employer requested administrative review of Denial of Labor Certification pursuant to §656.26(b)(1).

Discussion

The issues presented by this appeal are whether the employer provided lawful, job-related reasons for rejecting Applicant Noor Hossain; and whether the employer documented that the position of Live-In Cook constitutes permanent, full-time employment.

Generally, an employer must show that U.S. applicants are rejected solely for lawful, job-related reasons. § 656.21 (b) (6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. § 656.20 (c) (8). Therefore, an employer must take steps to ensure that it has lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. § 656.2 (b).

The Board has held that an applicant is to be considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 90-INA-90 (Mar. 28, 1991); *Mancil-las International Ltd.*, 88-INA-321 (Feb. 7, 1990); *Microbilt Corp.*, 87-INA-635 (Jan. 12, 1988). Moreover, the Board has held that an employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *Sterik Co.*, 93-INA-252 (Apr. 19,

1994); *American Cafe*, 90-INA-26 (Jan. 24, 1991); *Cal-Tex Management Services*, 88-INA-492 (Sept. 19, 1990); *Richco Management*, 88-INA-509 (Nov. 21, 1989); *Dharma Friendship Foundation*, 88-INA-29 (Apr. 7, 1988).

In the Final Determination, the CO found that the employer failed to provide lawful, job-related reasons for rejecting Applicant Noor Hossain. The employer, however, attempted to justify Mr. Hossain's rejection by arguing that he has no experience as a household cook and that he failed to provide evidence demonstrating that he previously worked in this capacity. While it is true Mr. Hossain has not worked as a household cook, we believe he is nonetheless capable of filling this position. Under §656.24(b)(2)(ii), the CO shall consider a worker qualified for a job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation. The employer specified that the employee's job duties will be planning menus; preparing and serving meals, dishes and pastries; preparing foods for special diets; and cleaning the kitchen and cooking utensils (AF 11). Mr. Hossain clearly possesses the training and education to perform these duties as the record reveals that he has more than 25 years of experience as a cook (AF 65). During his career, he has worked as a cook in three different hotels around the world, as well as a restaurant in New York. We find the employer's argument that Mr. Hossain was rejected because he has no household cook experience to be unpersuasive. This is true because the employer's business, a corporate retreat and convention complex, is more analogous to a hotel than a private home. Furthermore, his resume reveals that he previously was responsible for planning menus, preparing a la carte food for daily service, and ordering and receiving goods (AF 11). Based on the foregoing, certification cannot be granted and further examination of the record is unnecessary.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary

to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

***Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.